



STATE OF NEW YORK

UNEMPLOYMENT INSURANCE APPEAL BOARD

PO Box 15126

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DECISION OF THE BOARD

Mailed and Filed: SEPTEMBER 22, 2022

IN THE MATTER OF:

Appeal Board No. 623469

PRESENT: GERALDINE A. REILLY, MEMBER

The Department of Labor issued the initial determination disqualifying the claimant from receiving benefits, effective June 15, 2021, on the basis that the claimant lost employment through misconduct in connection with that employment and holding that the wages paid to the claimant by FREDERICK K BREWINGTON prior to June 15, 2021 cannot be used toward the establishment of a claim for benefits. The claimant requested a hearing.

The Administrative Law Judge held telephone conference hearings at which all parties were accorded a full opportunity to be heard and at which testimony was taken. There were appearances on behalf of the claimant and the employer. By decision filed April 27, 2022 (), the Administrative Law Judge overruled the initial determination.

The employer appealed the Judge's decision to the Appeal Board. The Board considered the arguments contained in the written statements submitted on behalf of the claimant and the employer.

Based on the record and testimony in this case, the Board makes the following

FINDINGS OF FACT: The claimant was employed by a law firm as a legal assistant for almost two years until June 14, 2021. The employer's sexual harassment policy provided that "All employees, including employees who witness harassment, are expected to comply with this policy and to cooperate with investigations of complaints of harassment. Managers and supervisors are responsible for implementing this policy with the employees [sic] area and should immediately advise the Office Manager if they become aware of possible

discrimination or harassment. Employees who violate this policy will be subject to discipline up to and including termination of employment.....Timeliness in reporting an incident is important. Prompt reporting of incidents is important so that appropriate action may be taken. However, due to the sensitivity of these problems and because of the emotional toll such misconduct may have on such individual, no fixed period has been set for reporting incidents or harassment or discrimination."

On December 28, 2020, the employer issued a letter of warning and placed the claimant on a 60-day probation period for job performance. The letter provided, "During the next 60 days any incidents or failures to abide by these terms may lead to termination."

* You must refrain from using foul language in the office whether to coworkers, in general comments and/or phone conversations."

Foul language was used by other coworkers in the office. The employer had a "cuss box" where employees were required to put money in the box if they used vulgarity. During her employment, the claimant was never directed to put any money in the box.

On June 14, 2021, the claimant's coworker, GL, was crying and told the claimant that she had been sexually assaulted by a male coworker, who was the owner's cousin. The claimant went to the mail room informed the office manager that GL was crying. The office manager told her she would speak to her when she was finished and directed the claimant to go back to her office. The claimant became upset and told her that she needed to speak to her right now. The claimant did not direct vulgarity toward the office manager in her presence. The office manager repeated her directive. The claimant returned to her office and slammed the door to her office. The office manager told the claimant that she was being suspended. The owner heard the door slam. Thereafter, the owner asked the claimant what had occurred. She told him that GL was harassed and that he needed to speak to GL. The owner asked the claimant what GL told her and she replied that he needed to speak to GL. The claimant asked the owner why she was being suspended and the owner told her that the office manager had the right to do so. The claimant left the building and she encountered GL and the owner's cousin in the parking lot. The claimant yelled at the cousin and went home.

On June 15, 2021, the employer discharged the claimant because it concluded

that she was insubordinate toward the office manager, that she used vulgarity in the office and in the parking lot, and that she violated sexual harassment policy.

OPINION: The credible evidence established that the employer discharged the claimant because it concluded that she was insubordinate toward the office manager, that she used vulgarity in the office and in the parking lot, and that she violated the sexual harassment policy. As to the alleged insubordination, the claimant did return to her office as directed by the office manager. The office manager also admitted that she did not use vulgarity toward her during their interaction. Although she had slammed the door, in the absence of any prior warnings for similar behavior, her actions were an isolated incident of poor judgement and not misconduct (See Matter of Salcedo, 171 AD3d 1437 [3d Dept 2019]; Matter of Irons, 79 AD3d 1511 [3d Dept 2010]).

As to the issue of vulgarity, even if the claimant had used it in the office or in the parking lot on June 15, 2021, we find that she was not on notice that such behavior would jeopardize her job. Although she had been warned on December 28, 2020, the 60-day probation period had expired. In addition, foul language was common in the office. The owner admitted that there was a "cuss box" and employees would be fined if they used vulgarity. Further, the claimant was never fined. Finally, given the circumstances of the alleged sexual assault by the owner's cousin, any use of vulgarity by the claimant in the office or in the parking lot, amounts to an isolated instance of poor judgment. For these reasons, we agree with the Judge that it was not necessary to receive evidence from two additional employer witnesses regarding the claimant's alleged use of vulgarity.

As to the issue of the violation of the sexual harassment policy, even if the claimant had received the sexual harassment policy, the claimant had told both the owner and the office manager that GL was harassed and that they should speak to her. In any event, we agree with the Judge's opinion that the policy provides that reporting harassment may take an emotional toll and does not provide a time limit for its reporting. Given that the alleged harasser was the owner's cousin and given the claimant's emotional state about the issue and at having been told that she was suspended, any failure by the claimant to specify what GL told her was, at most, an isolated incident of poor judgment and not misconduct. Accordingly, we conclude that the claimant's employment ended under non-disqualifying circumstances.

DECISION: The decision of the Administrative Law Judge is affirmed.

The initial determination, disqualifying the claimant from receiving benefits, effective June 15, 2021, on the basis that the claimant lost employment through misconduct in connection with that employment and holding that the wages paid to the claimant by prior to June 15, 2021 cannot be used toward the establishment of a claim for benefits, is overruled.

The claimant is allowed benefits with respect to the issues decided herein.

GERALDINE A. REILLY, MEMBER